SUPREME COURT, U. S.

Supreme Court, U.S.
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in the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1579

HARTFORD ACCIDENT AND INDEMNITY COMPANY,

Petitioner,

vs.

EASTERN AIRLINES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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MIAMI REVIEW — 371-4853 — 377-3721

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Supreme Court
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HARTFORD ACCIDENT AND INDEMNITY COMPANY,

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vs.

EASTERN AIRLINES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, Hartford Accident and Indemnity Company, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on January 27, 1971.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the appendix hereto. The final judgment entered by the United States District Court for the Southern District of Florida is unreported and said judgment together with the findings of fact and conclusions of law appears in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on January 27, 1971. A timely petition for rehearing was denied on March 1, 1971, and this petition for certiorari was filed within ninety days of that date. This court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether a federal court of appeals can disregard the direct application of a state statute (effective January 1, 1967) to a sales agreement executed in 1967.

STATUTORY PROVISIONS INVOLVED

United States Codes Title 28:

§ 1652. *State laws as rules of decision*

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

The Uniform Commercial Code on sales adopted by Florida on January 1, 1967, provides under §672.2-313, Florida Statutes (Volume 19 A, F.S.A.):

> "Express warranties by affirmation, promise, description, sample
>
> "(1) Express warranties by the seller are created as follows:
>
> * * *
>
> "(b) Any description of the goods which is made a part of the basis of the bargain creates an express warranty that the goods shall conform to the description."

STATEMENT OF THE CASE

Eastern Airlines, a Delaware corporation, sued Hartford Accident and Indemnity Company, a Connecticut corporation, on a performance bond written by Hartford in favor of Jet Power, Inc. for breach of a sales contract between Eastern and Jet Power (Appendix, pp. A-2, C-1). Under the agreement Eastern was to sell to Jet Power certain Lockheed Constellation aircraft and all of Eastern's spare parts for this type of aircraft (Appendix, pp. C-1, 2). The primary consideration for Jet Power under the sales contract was the selling by Eastern of its spare engine parts manufactured by Curtis-Wright for the Constellations (R. 511, 532, 589, 597, 606, 630-632).

The spare parts inventories of Eastern contained thousands of different parts; each part was described by a specific manufacturer's part number (Appendix, pp. A-3, 4; C-2). Eastern valued the inventory of the parts in excess of $4,800,000 (Appendix, pp. A-3-5; R. 510, 511, 531, 532, 589, 606, 630-632).

Delivery of the parts requested was commenced shortly after execution of the agreement. The requested parts were ordered by their manufacturer's part number as listed in the inventory. Approximately eighty to ninety per cent of the engine parts delivered to Jet Power, however, were not the parts described in the inventories but were old or superseded parts and thus nonconforming (Appendix A-3; R 644, 645).

When Jet Power asked for assurance that the balance of the deliveries under the agreement would conform to the parts listed in the inventory, Eastern Airlines advised Jet Power by letter that the latter would have to take all of the Constellation parts notwithstanding the discrepancy between the part delivered and the part listed in the inventory (R. 230-233, 613, 614).

Following this letter, Eastern commenced this action for the balance of the $1,447,537 contract price and the trial court rendered a judgment in Eastern's favor in the amount of $259,000 (Appendix pp. B-1, 2). The trial court and the appellate court, permitted Eastern to escape liability on the ground that the pertinent provision of the agreement of sale was clear and unambiguous and that the parties understood that the listing of the types of parts stocked by Eastern did not require the parts listed to be the same as the parts actually stocked by Eastern

(Appendix, pp. A-4-7; C-2). The pertinent provision in the agreement relative to the sale of the Curtiss-Wright spare parts was the following:

> "5. The spare parts inventory included (R. 7; PX No. 1C) in this sale shall be the residual of those parts listed in Exhibit B, Spare Parts Inventory dated July 14, 1967, and supplement dated August 11, 1967, remaining after termination of operation of the Constellations in EASTERN'S scheduled service and termination of existing maintenance service contracts on December 31, 1967.
>
> "It is understood that Exhibit B, Spare Parts Inventory, is a listing of the type of parts stocked by EASTERN and the quantity of such parts believed to be in EASTERN'S possession as of the date such exhibit was prepared, and it may or may not reflect the actual inventory as of the date of this agreement." (Appendix, pp. A-3, 4; C-2).

Although the agreement was executed in Florida and was to be performed in Florida and was subject to the provisions of the Uniform Commercial Code on sales adopted by the Legislature of the State of Florida, effective January 1, 1967, the Fifth Circuit by its decision, bypassed the controlling Florida Statute.

The petition for rehearing advised the Fifth Circuit of its failure to apply the statutory law of Florida to no avail (Appendix, p. F-3).

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW CONFLICTS WITH A PRIOR DECISION OF THIS COURT AND VIOLATES THE CONGRESSIONAL MANDATE THAT FEDERAL COURTS SHALL FOLLOW THE STATE LAWS IN CASES WHERE THEY APPLY.

Section 1652 of Title 28 provides in pertinent part that federal courts in civil actions shall regard the laws of the several states as rules of decision in cases where they apply. This Court in the Case of *Erie v. Tompkins*, 304 U.S. 64 (1938) held that the federal courts are required to apply state law imposed by statutory enactment in diversity cases.

In the case *sub judice*, the Fifth Circuit was required to review a sales agreement that was executed in Florida and that was to be performed in Florida. The primary issue was whether an express warranty was created by the terms of the agreement. The determination of that issue cannot be resolved without applying the Uniform Commercial Code as adopted in Florida.

The controlling section of the Code in the Florida Statutes is § 672.2-313, 19A F.S.A. This section provides that where the description of the goods is made part of the basis of the bargain the seller creates an express warranty that the goods *shall* conform to the description.

As pointed out in the statement of the case, *supra*, the inventories listing the spare engine parts became a part of the agreement and a part of the basis of the bargain. All

the spare parts listed in the inventories were described by a specific, definite, technical manufacturer's part number and by operation of the Code were expressly warranted to be in Eastern's possession.

Comment 5 of § 672.2-313, supra, states:

> "Paragraph (1) (b) makes specific some of the principles set forth above when a description of the goods is given by the seller.
>
> "A description need not be by words. Technical specifications, blueprints and the like can afford more exact description than mere language and if made part of the basis of the bargain goods must conform with them . . . . "

The Fifth Circuit held that the (technical) listings of the types of parts stocked by Eastern did not require further technical description as the parties understood that the listings of the spare parts inventory may or may not reflect the actual inventory of the date of the agreement. The appellate court overlooked that "actual" inventory referred to the *quantity* of the spare parts and not to the technical description of the parts.

Under Florida law, an express warranty cannot be reduced except in unusual circumstances. *Comment* 4 of § 672.2-313, *supra*, provides in pertinent part as follows:

> "In view of the principle that the whole purpose of the law of warranty is to determine what it is that the seller has in essence agreed to sell, the policy is adopted of those cases which refuse ex-

> cept in unusual circumstances to recognize a material deletion of the seller's obligation. Thus, a contract is normally a contract for a sale of something describable and described. A clause generally disclaiming 'all warranties, express or implied' cannot reduce the seller's obligation with respect to such description and therefore cannot be given literal effect under Section 2-316."

By its decision, the Fifth Circuit declined to follow the pertinent law of Florida and frustrated the basic Legislative purpose that under the adopted Uniform Commercial Code on sales a purchaser shall receive the goods bargained for and the goods shall conform to those described by the seller.

Florida adopted the Code and, in particular, the express warranty by description section to avoid the deceitful practice engaged in by Eastern where it offered specific parts for sale, but had in its possession different parts of lesser value and lesser safety.

The Fifth Circuit hould be made to follow the relevant law of the State of Florida.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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By _____
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I, Richard M. Gale, attorney for petitioner, and a member of the Bar of the Supreme Court of the United States do hereby certify that I have this 13th day of April, 1971, mailed, First Class postage prepaid, three printed copies of the petition for Writ of Certiorari and Appendix to Charles A. Kimbrell, Esq., Dade Federal Building, Miami, Florida.

RICHARD M. GALE
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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE SOUTHERN DISTRICT OF
FLORIDA MIAMI DIVISION

CASE NO. 68-1161-Civ-WM

EASTERN AIRLINES, INC.,
a Delaware corporation,

Plaintiff,

v.

HARTFORD ACCIDENT AND INDEMNITY
COMPANY,
a Connecticut corporation,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

INTRODUCTION

This is an action by the plaintiff, EASTERN AIRLINES, INC. (Eastern) to recover on a performance bond written by the defendant, HARTFORD ACCIDENT AND INDEMNITY COMPANY, (Hartford). On September 18, 1967, the plaintiff Eastern and Jet Power, Inc. entered into a contract whereby Eastern agreed to sell and Jet Power agreed to buy twenty-nine (29) Lockheed Constellation aircraft and all of Eastern's spare engines and complete inventory of spare parts peculiar to the aircraft except as otherwise modified by the agreement. On Octo-

ber 4, 1967, the defendant Hartford wrote a performance bond in which it guaranteed the performance by Jet Power of its contract with Eastern.

Eastern's contention was that Jet Power breached the contract and that it sustained damages as a result of such breach. Eastern further contended that Hartford is liable to it for all of its damages under the terms of the performance bond.

This cause was tried by the Court after each party, by stipulation, waived trial by jury.

FINDINGS OF FACT

1. The plaintiff, EASTERN AIR LINES, INC., is a corporation organized under the laws of the State of Delaware, and its principal place of business is in Dade County, Florida.

2. The defendant, HARTFORD ACCIDENT AND INDEMNITY COMPANY, is a corporation organized under the laws of the State of Connecticut, and its principal place of business is in the State of Connecticut.

3. The contract in dispute was entered into on the 18th day of September, 1967, and duly executed by C. J. Simons, Vice President, on behalf of Eastern, and Badr Halwany, President, on behalf of Jet Power, Inc.

4. The defendant Hartford did write a performance bond dated October 4, 1967, guaranteeing the performance of Jet Power in its contract with Eastern, and said bond is in the principal sum of $1,000,000.00.

5. On November 9, 1967, Eastern notified Hartford by registered mail, asserting that its contract with Jet Power was in default and that if the default was not remedied, claim would be made against Hartford on the bond. Said letter of notification was duly received by Hartford on the 13th day of November, 1967.

6. In accordance with an idemnity agreement between Hartford and Jet Power, Hartford tendered the defense of the suit brought against it by Eastern to Jet Power, which said tender was accepted by Jet Power.

7. The Court finds that Jet Power did breach its contract with Eastern by wrongfully rejecting the entire contract on October 27, 1967, and refused to perform thereafter.

8. Hartford's defense was based on its contention that Eastern had made non-conforming deliveries of Curtiss-Wright 35 Account engine parts that substantially impaired the value of the whole contract to Jet Power. This defense was based on the fact that Eastern stocked parts under its own part number and that its computer listing Exhibit B and supplement to the contract of September 18, 1967, showed only the Eastern part number and single manufacturer's part number. Under the single Eastern number and single manufacturer's number, Eastern stocked both the manufacturer's part number shown on the computer listing and any other manufacturer's part numbers that were functionally and physically interchangeable.

9. That the second paragraph in numbered paragraph 5 was not intended by the parties to be a represen-

tation that the actual parts delivered would have the manufacturer's part numbers as shown on Exhibit B and its supplement, and it was not intended to be a technical description of the goods to be sold.

10. Eastern's inventory system is similar to or the same as the inventory systems used by many of the United States commercial airlines.

11. All commercial airlines keep superseded parts in their respective inventory of parts which are interchangeable, both physically and functionally.

12. Superseded parts which were interchangeable, both physically and functionally, were conforming parts (goods) under the Eastern—Jet Power contract.

13. All additional parts, air frame and others, did conform to the contract.

14. All aircraft and spare engines did conform to the contract.

15. On and after October 27, 1967, Eastern was willing and able to proceed with its obligations under the contract and it continued to tender delivery of aircraft and parts pursuant to the contract to Jet Power.

16. After default by Jet Power, Eastern had the right and did sell all airplanes, spare engines and spare parts in a commercially reasonable manner for a total price of $1,055,924.08.

17. Under the contract Jet Power would have paid for aircraft, spare engines and spare parts the sum of $1,422,043.86 had it not defaulted.

18. In its computation of damages, Eastern gave Hartford credit for the following amounts: $80,000.00 for the deposit made pursuant to the contract, $60,000.00 for value of parts retained by Eastern, $6,750.00 for value of failed engines, $1,728.89 for value of Eastern manufactured parts, and $10,000.00 for value of ground equipment, or a total credit of $158,478.89. The Court finds that these were the only credits Hartford was entitled to receive under the contract.

19. Eastern incurred incidental damages in a commercially reasonable manner in connection with the maintenance and storage of airplanes, additional labor and handling expense resulting because of Jet Power's breach of contract in the amount of $51,928.00.

20. Eastern sustained total damages as a result of the breach of contract by Jet Power in the sum of $259,568.89, for which said sum Hartford is obligated to pay Eastern.

21. The Court finds with respect to the defenses asserted by Hartford that:

(a) Eastern did not repudiate the contract by making deliveries of non-conforming goods which substantially impaired the value of the contract as a whole to Jet Power.

(b) Eastern did not repudiate the contract by rejecting its continued obligations under the contract or by not intending to perform except under conditions which were beyond the contract.

(c) Eastern did not repudiate the contract with respect to performance not yet due.

(d) Jet Power had no reasonable grounds for insecurity and did not make a written demand for adequate assurance to Eastern in its letter of October 26, 1967.

(e) Eastern was not guilty of fraud or misrepresentation.

(f) There was no mutual or unilateral mistake of fact between the parties.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the parties and the subject matter.

2. The contract of September 18, 1967, between Eastern and Jet Power is clear and unambiguous and was intended by the parties as a final expression of their agreement.

3. The disclaimer of any warranties, express or implied, in the contract were reasonable in commercial practice in view of the residual nature of the goods to be sold.

4. Under paragraph 1 of the agreement of September 18, 1967, Eastern had an absolute obligations to sell and Jet Power had an absolute obligation to buy twenty-nine (29) Constellation aircraft and all of Eastern's spare engines and complete inventory of spare parts peculiar to the aircraft except as otherwise modified by the agreement.

5. The modifications referred to in paragraph 1 of the agreement related to Eastern's right to use parts to

support its fleet of aircraft until their final retirement, to support maintenance overhaul contracts not to exceed eighteen (18) engines, Eastern's right to delete an aircraft for contribution to the Smithsonian Institute, Eastern's right to retain a cargo aircraft and supporting engines and spare parts, its right to make emergency and accommodation sales to other airlines in accordance with its industry agreements, its right to delete damaged aircraft or aircraft that it was not economically feasible to place in flyable condition.

6. The second paragraph in numbered paragraph 5 of the agreement was a warning by Eastern to Jet Power that Exhibit B and its supplement were merely listings of the type of parts stocked and the quantity of such parts believed to be in Eastern's possession as of the date the exhibits were prepared, and that such listings might not reflect actual inventory as of September 18, 1967. The language contained in this paragraph was not a representation that the actual parts delivered would have the manufacturer's part number as shown on Exhibit B and its supplement. It did not constitute a sale by technical description.

7. The contract for sale of parts (goods) was an "as is" contract with no representation as to quantity, condition, serviceability, merchantability or fitness for intended use. The exclusion of the warranty of merchantability was an exclusion of any warranty that the goods would pass without objection in the trade under the contract description. In effect, the "as is" provision amounted to an agreement by the parties that the condition of the goods was to be immaterial.

8. The option in paragraph 14 of the agreement of September 18, 1967, for Jet Power to purchase parts used on the Constellations and not listed on Exhibit B, providing such items had been declared excess by Eastern, related to parts usable both on Constellations and other aircraft currently in service by Eastern, and not to parts peculiar to the Constellations.

9. Eastern was only obligated to account or credit Jet Power for sales made after September 18, 1967, and Eastern was not obligated to account or credit to Jet Power for cancellation of purchase orders for stock which had not been received by Eastern.

10. The measure of damages herein were in accordance with the provisions of the Uniform Commercial Code, Florida Statutes, adopted January 1, 1967, which governs the contract, and the plaintiff is entitled to recover the sum of $259,568.89 at the rate of six (6%) percent per annum.

CONCLUSION

Eastern has proved its case against Hartford by the greater weight of the evidence and a judgment in accord with the above should be entered.

DATE at Miami, Florida, this 25th day of March, 1970.

/s/ William O. Mehrtens

UNITED STATES DISTRICT JUDGE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE SOUTHERN DISTRICT OF
FLORIDA MIAMI DIVISION

CASE NO. 68-1161-Civ-WM

EASTERN AIRLINES, INC.,
a Delaware corporation,

Plaintiff,

v.

HARTFORD ACCIDENT AND INDEMNITY
COMPANY,
a Connecticut corporation,

Defendant.

JUDGMENT

THIS ACTION came on for trial before the Court, Honorable William O. Mehrtens, District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered, it is:

ORDERED AND ADJUDGED that the plaintiff, EASTERN AIR LINES, INC., recover of the defendant, HARTFORD ACCIDENT AND INDEMNITY COMPANY, the sum of Two Hundred Fifty-nine Thousand Five Hundred Sixty-eight Dollars and Eighty-nine Cents

($259,568.89), with interest thereon at the rate of six (6%) percent as provided by law, and its costs of action.

DATED at Miami, Florida, this 25th day of March, 1970.

/s/ William O. Mehrtens

UNITED STATES DISTRICT JUDGE

cc: Parties of record.

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 29889

EASTERN AIRLINES, INC.,
Plaintiff-Appellee,

versus

HARTFORD ACCIDENT AND INDEMNITY COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

---

(January 27, 1971)

Before GEWIN, COLEMAN and AINSWORTH
Circuit Judges.

PER CURIAM: In this diversity action Eastern Air Lines sued Hartford Accident and Idemnity Company on a performance bond written by Hartford in favor of Jet Power, Inc., for breach of a sales contract between Eastern and Jet Power. Under the contract Jet Power agreed to

purchase from Eastern certain Lockheed Constellation aircraft and all of Eastern's spare parts for this type of aircraft which Eastern was removing from service. The trial was held before District Judge Mehrtens, sitting without a jury.

We have carefully reviewed the record and the contentions of the parties as well as the findings of fact and conclusions of law of the District Court. We believe that there was no error in the judgment below. The District Judge correctly held that the parties entered into a clear and unambiguous contract, that the parties understood that the listings of the types of parts stocked by Eastern and the quantity thereof did not require further technical description. It is likewise clear from the record that the parties understood and stated in their written contract that the exhibit attached to the contract, which listed the spare parts inventory, "may or may not reflect the actual inventory as of the date of this agreement."

We agree with the Trial Court that Jet Power wrongfully breached the contract, failed in its obligation to take delivery of the aircraft and parts for which it had contracted, and accordingly that Eastern is entitled to recover damages in the amount found by the District Judge. Nor was credit due defendant for the repair of the aircraft at the rate of $3,000 per plane, there being no proof in the record in this regard. Most of the planes involved were flyable and in actual use by Eastern so that additional cost was not required to put them in condition and make them flyable. The alternate claim for credit, therefore, also fails for lack of proof.

AFFIRMED.

APPENDIX D

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 29889

EASTERN AIRLINES, INC.,
Plaintiff-Appellee,

versus

HARTFORD ACCIDENT AND INDEMNITY COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

---

(March 1, 1971)

ON PETITION FOR REHEARING

Before GEWIN, COLEMAN and AINSWORTH,
Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

purchase from Eastern certain Lockheed Constellation aircraft and all of Eastern's spare parts for this type of aircraft which Eastern was removing from service. The trial was held before District Judge Mehrtens, sitting without a jury.

We have carefully reviewed the record and the contentions of the parties as well as the findings of fact and conclusions of law of the District Court. We believe that there was no error in the judgment below. The District Judge correctly held that the parties entered into a clear and unambiguous contract, that the parties understood that the listings of the types of parts stocked by Eastern and the quantity thereof did not require further technical description. It is likewise clear from the record that the parties understood and stated in their written contract that the exhibit attached to the contract, which listed the spare parts inventory, "may or may not reflect the actual inventory as of the date of this agreement."

We agree with the Trial Court that Jet Power wrongfully breached the contract, failed in its obligation to take delivery of the aircraft and parts for which it had contracted, and accordingly that Eastern is entitled to recover damages in the amount found by the District Judge. Nor was credit due defendant for the repair of the aircraft at the rate of $3,000 per plane, there being no proof in the record in this regard. Most of the planes involved were flyable and in actual use by Eastern so that additional cost was not required to put them in condition and make them flyable. The alternate claim for credit, therefore, also fails for lack of proof.

AFFIRMED.

APPENDIX D

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 29889

EASTERN AIRLINES, INC.,
Plaintiff-Appellee,

versus

HARTFORD ACCIDENT AND INDEMNITY COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

---

(March 1, 1971)

ON PETITION FOR REHEARING

Before GEWIN, COLEMAN and AINSWORTH, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

APPENDIX E

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 29889

D. C. Docket No. Civ. 68-1161-WM

EASTERN AIRLINES, INC.,
Plaintiff-Appellee,

versus

HARTFORD ACCIDENT AND INDEMNITY COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

---

Before GEWIN, COLEMAN and AINSWORTH,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel:

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendant-appellant pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

January 27, 1971

Issued as Mandate:

APPENDIX F

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 29889

EASTERN AIRLINES, INC.,
Plaintiff-Appellee,

v.

HARTFORD ACCIDENT AND INDEMNITY COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

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PETITION FOR REHEARING

Defendant-Appellant, Hartford Accident and Idemnity Co., by and through its undersigned counsel petitions the Court for a rehearing of its decision and as grounds in support thereof, states:

1. The Per Curiam opinion contains two sentences in regard to the agreement of sale between Eastern Air Lines and Jet Power. These two sentences read as follows:

> "The District Judge correctly held that the parties entered into a clear and unambiguous contract, that the parties understood that the listings of the types of parts stocked by Eastern and the quantity thereof did not require further technical description. It is likewise clear from the record that the parties understood and stated in their written contract that the exhibit attached to the contract, which listed the spare parts inventory, 'may or may not reflect the actual inventory as of the date of this agreement.' "

2. These two sentences indicate that the Court construed the contract and, in particular, the second paragraph of paragraph numbered 5 of the contract without any reference to the Uniform Commercial Code as will be shown, *infra.*[1]

3. The "listings of the type of parts stocked by Eastern" is contained in Exhibit B, Spare Parts inventory. This inventory sets forth the manufacturer's number for each part. This Court concluded said listings "did not require further technical description." The Court was correct in finding no further technical description was necessary since the manufacturer's part number affords a more exact description than mere language. The Court then proceeds to an erroneous result, however, by ruling that Jet Power breached the contract, notwithstanding that Eastern did not have in stock the part described by

[1] "It is understood that Exhibit B, Spare Parts Inventory, is a listing of the type of parts stocked by EASTERN and the quantity of such parts believed to be in EASTERN's possession as of the date such exhibit was prepared, and it may or may not reflect the actual inventory of the date of this agreement."

the manufacturer's part number. Instead, Eastern had in stock a superseded part with a different manufacturer's part number for the part listed.

4. The Federal District Courts and, in turn, this Court are required to apply the State law in diversity cases and this embraces, of course, not only State law imposed by statutory enactment but also State law as formulated in decisions of a State's highest tribunal. 1 Stat. 92 (Section 34 of the Judiciary Act of 1789); *Erie v. Tompkins*, 304 U.S. 64 (1938). Therefore, the Court was bound to apply Section 672.2-313, Florida Statutes in interpreting the contract, which it failed to do. The aforesaid section deals with description of goods. It provides in pertinent part as follows:

> "(1) Express warranties by the seller are created as follows:
>
> * * *
>
> "(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description."

Exhibit B lists the goods by manufacturer's part number. To hold that the manufacturer's part number does not describe a particular and specific part and that said description is not part of the basis of the bargain is unreasonable in view of § 672.2-313, *supra*. Yet this Court holds, in effect, that the actual parts do not have to conform to the manufacturer's part number.

5. The Court attempts to avoid its fallacious reasoning by grasping the following quoted language in the

critical paragraph of the agreement that the spare parts inventory "may or may not reflect the actual inventory as of the date of this agreement." The Court should find little solace, however, in the last phrase, since Eastern is referring to the *quantity* of the spare parts and not the type of parts.

It must be recalled that Eastern had entered into an agreement with Leasing Consultants, Inc., on or about the first of August, 1967, to sell the latter company the same spare parts inventory (A 171). There was a default by Leasing Consultants (A 172).

In references to the contract with Leasing Consultants and of immense importance to a determination of the intent of Eastern in drafting the critical paragraph are Eastern's requests to defendant to make the following admissions which were read into the record:

> "MR. FREED: This is a request for admissions (A 532) (A 533) from Eastern Air Lines to Hartford, No. 23:
>
> "23. That after negotiations were completed as to quantities and prices and to substantially all the language of the agreement, that plaintiff's legal department proposed that the language in Section 5 of the agreement between plaintiff and Leasing Consultants be amended by adding a second paragraph to read:
>
> "It is understood that Exhibit B, spare parts inventory, is a listing of the type of parts stocked by Eastern and the quantity of such parts believed to be in Eastern's possession as

> of the date such exhibit was prepared, and it may or may not reflect the actual inventory as the date of this agreement.' "

"In answer to that request it is admitted except that types as well as quantities and prices were negotiated and no reference was made to any agreement between plaintiff and Leasing Consultants, because there was an obvious error there as to what parts they referred to.

> " '[No.] 24. That the stated purpose of the proposed addition referred to in Request for (A 534) admission No. 24 was to reflect the fact that a substantial period of time had passed since Exhibit B had been prepared in the course of negotiations with Leasing Consultants and that the inventory might have changed as a result of sales, purchases and use during that period.' "

The answer is, assuming the statement is meant to read request for admission No. 23, in place of No. 24, as well as there was a typographical error, it is admitted that one of the stated purposes was to reflect the facts stated as well as the fact that Exhibit B and the supplement to Exhibit B was a true listing of the type of parts stocked by Eastern, the actual inventory, except for changes as a result of sales, purchases and uses during the period from August 11, 1967, until the execution of the Contract."

From the foreging requests for admissions, it is patently evident that Eastern, amended the critical paragraph to avoid any breach of the contract dealing with the QUANTITY of parts remaining in stock.

6. This Court has completely overlooked in the contract the distinction between description of the [parts] goods and quantity of the [parts] goods. In part, this is due to the Court's reluctance to recognize and to apply § 672.2-313, *supra*, to the contract. When this controlling section is applied to the language of the contract, there is created an express warranty by description that the [parts] goods will conform to the manufacturer's part number. This is the "clear understanding" of the parties from the language of the contract.[2]

Wherefore, the Court should reconsider its opinion and decision, grant a rehearing and reverse the judgment below.

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[2]Dutton, Eastern's supervisor in charge of disposing of the spare parts inventory admitted that he believed the parts in stock were those described by the manufacturer's part number (A 254, 255).

Respectfully submitted,

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